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Supreme Court, U.S.
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No. 02-172

IN THE

Supreme Court of the United States

BETH B. and SUSAN AND TOM B., Individually and as Next Friends of BETH B.,

Petitioners,

v.

MARK VAN CLAY, Individually and in his Official Capacity as Superintendent, and LAKE BLUFF SCHOOL DISTRICT #65,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

The School District in this case prevailed before the Seventh Circuit, the district court and the administrative hearing officer. Pet., App. A at 12a; App. B at 39a; App. C at 103a. All three held that the School District satisfied its legal burden of designing a program for Beth that was reasonably calculated to enable her to receive educational benefit. Pet., App. A at 11a; App. B at 24a; App. C at 103a. All three also held that the educational program recommended by the School District provided Beth with a free appropriate public education ("FAPE") in the least restrictive environment ("LRE"). *Id.*

Beth is 14 years old and would currently be enrolled in the eighth grade.[1] The placement recommended by Beth's Individualized Education Program ("IEP") team is in a self-contained special education classroom in a neighboring school district in a building that also serves regular education students, thus allowing opportunities for mainstreaming. Pet., App. A at 4a.

This self-contained placement is appropriate for Beth because of the severe and profound nature of her disabilities. Estimates of her cognitive ability vary from that of a one-year-old to a six-year-old. Pet., App. A at 3a. Beth is nonverbal and wheelchair-bound. *Id.* She requires one-on-one assistance from at least one adult (sometimes two) during the entire school day. *Id.* Beth is unable to read or recognize letters or numbers. *Id.* Her school work is individually modified for her at a preschool level. *Id.*

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1. Beth is not currently attending a public school. Her parents withdrew her from school at the beginning of the 2001-2002 school year.

Petitioners' theory is that the administrative hearing officer did not know which way to decide this case so he deferred to the School District's recommendation. Pet. at 9. Petitioners further claim that the district court and the Seventh Circuit then compounded this "error" by upholding the hearing officer's decision, and in the process, committed numerous errors of their own. However, even cursory reviews of the three underlying decisions in this case demonstrate that at each level, and with each issue, the facts were carefully reviewed and the applicable laws were properly interpreted and applied.

Petitioners would have this Court believe that every Circuit Court to have considered the issue of LRE to date has done so incorrectly. Pet. at 20. They submit to this Court that the Circuits are in "disarray" and that this Court should intervene to instruct them as to the correct test. Pet. at 21. Simply put, Petitioners advocate a test that would result in no child being removed from his or her regular education home school.

The Seventh Circuit saw through Petitioners' argument: "Instead of granting flexibility and the deference they are owed; [Petitioners' proposed test] essentially vitiates school districts' authority to place any disabled children in separate special education environments. Neither Congress nor the Supreme Court intended such a result." Pet., App. A at 10a.

The questions presented in the Petition could scarcely be more confusing, which is compounded by the liberties Petitioners take with the facts of the case. For example, contrary to Petitioners' assertion, Beth's academic progress in the regular education setting was, in the words of the Seventh Circuit, "virtually nonexistent." Pet., App. A at 11a.

Petitioners' statement that Beth was "sometimes absent" flies in the face of the Seventh Circuit's finding that "Beth was in class for about fifty percent of each day." *Id.*

Petitioners also mislead this Court by stating that the hearing officer "did not find that the School District's proposed placement of Beth was better than that conferred in regular school, nor did he conclude that she could not receive educational benefit from her regular school placement." Pet. at 9. The hearing officer did not make these findings because *these are not the correct standards*. The hearing officer applied the correct standard and unequivocally held that:

> The placement proposed by the School District for the Student in this case meets the responsibility of the School District under the IDEA to provide an appropriate placement for her in the least restrictive environment. The Hearing Officer hereby declines to issue any of the findings or grant any of the relief requested by the Parents.

Pet., App. C at 103a.

The Seventh Circuit's decision does not raise the questions presented by the Petition. The decision is not in conflict with either the Individuals with Disabilities Education Act ("IDEA") or any court decision. The three articulated LRE tests from the Fifth, Sixth and Ninth Circuits do not contradict each other. In fact, the three tests are nearly identical. The Seventh Circuit did not adopt a test, instead choosing to rely directly on the language of the IDEA and its implementing regulations. Pet., App. A at 10a. The Seventh Circuit properly decided that the School District's decision

to remove Beth from a regular education setting did not violate the IDEA's mandate for mainstreaming. Pet., App. A at 11a. For these reasons, Respondents respectfully ask this Court to deny the Petition for Writ of Certiorari.

I.

THE SEVENTH CIRCUIT'S DECISION DOES NOT PRESENT A CONFLICT AMONG THE CIRCUITS NOR DOES IT CONFLICT WITH THE IDEA

Compelling reasons for granting a writ of certiorari include a conflict between courts of appeals on an important matter or a decision by a court of appeals on an important federal question that conflicts with a decision of this Court. Sup. Ct. R. 10. Petitioners do not allege a conflict between the Seventh Circuit's decision and a decision of this Court. They do, however, contend that the criteria applied by the Seventh Circuit for assessing Beth's placement in the LRE are at odds with the criteria applied by other Circuits. This is not the case.

This Court has not adopted an LRE test. *Murray v. Montrose County School District*, 51 F.3d 921 (10th Cir. 1995), *cert. denied*, 516 U.S. 909 (1995). The three generally recognized LRE tests are the Fifth Circuit's *Daniel R.R.* test, the Sixth Circuit's *Roncker* feasibility test, and the Ninth Circuit's *Holland* test. *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989); *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983), *cert. denied*, 464 U.S. 864 (1983); *Sacramento City Unified Sch. Dist. v. Rachel H. by Holland*, 14 F.3d 1398 (9th Cir. 1994), *cert. denied*, 512 U.S. 1207 (1994).

A. *Roncker* LRE Test

The Sixth Circuit was the first Circuit Court to establish an LRE test, commonly referred to as the "feasibility" or "*Roncker*" test. *Roncker*, 700 F.2d at 1060. This test has been adopted by the Fourth and Eighth Circuits. *Hartmann v. Loudoun County Board of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997), *cert. denied*, 522 U.S. 1046 (1998); *Devries v. Fairfax County School Board*, 882 F.2d 876, 879 (4th Cir. 1989); *A.W. v. Northwest R-1 Sch. Dist.*, 813 F.2d 158, 163 (8th Cir. 1987), *cert. denied*, 484 U.S. 847 (1987).

Applying the *Roncker* test, one must first determine whether the services which make a self-contained placement superior could be feasibly provided in a less restrictive setting. *Roncker* at 1063. If so, placement in a self-contained program would not be appropriate. *Id.* The court recognized that a self-contained placement would be appropriate when the student would not benefit from mainstreaming or was a disruptive force in the regular education setting. *Id.* at 1063.

The *Roncker* Court considered a number of factors, including: the student's progress, or lack thereof, in the regular education setting; what services the student was provided with in the regular education setting; the cost of the services provided; and the effect the student's presence had on his or her peers. *Id.* at 1063-64. The *Roncker* Court recognized that the educational, physical and emotional needs of a special education student all had to be taken into account when making a decision concerning the student's educational placement. *Id.* at 1063.

B. *Daniel R.R.* LRE Test

The *Daniel R.R.* LRE test was articulated by the Fifth Circuit in 1989. *Daniel R.R.*, 874 at 1048-49. The *Daniel R.R.* test has been adopted in the Third, Ninth and Eleventh Circuits. Michael A. Rebell, *Special Education Inclusion and the Courts: A Proposal for a New Remedial Approach*, 25 J.L. & Educ. 523, 560 (1997), *citing Greer v. Rome City Sch. Dist.*, 950 F.2d 688 (11th Cir. 1991), *op. withdrawn*, 956 F.2d 1025 (11th Cir. 1992), *op. reinstated in part*, 967 F.2d 470 (11th Cir. 1992), *reh'g denied*, 974 F.2d 173 (11th Cir. 1992); *Oberti v. Board of Educ.*, 995 F.2d 1204 (3d Cir. 1993); *Poolaw v. Bishop*, 67 F.3d 830 (9th Cir. 1995); *Holland*, 14 F.3d at 1401.

The first prong of the *Daniel R.R.* test asks whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily. *Daniel R.R.*, 874 F.2d at 1048. The factors considered by the court in the first prong of the test are non-exhaustive and must be based on the facts of each case, including: the steps taken to accommodate the student in a regular education classroom; whether the student can receive educational benefit in a regular education setting; the student's experience in the regular education classroom; and the effect the student's presence has on the other children in the regular education classroom. *Id.* at 1048-50.

The second prong of the *Daniel R.R.* test clarifies that if placement outside the regular education classroom is necessary, the school district must mainstream the student to the maximum extent appropriate. *Id.* at 1050.

C. *Holland* LRE Test

The Ninth Circuit adopted a hybrid of the *Daniel R.R.* and *Roncker* tests:

> Although the district court relied principally on *Daniel R.R.* and *Greer*, it did not specifically adopt the *Daniel R.R.* test over the *Roncker* test. Rather, it employed factors found in both lines of cases in its analysis. The result was a four-factor balancing test in which the court considered (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect Rachel had on the teacher and children in the regular class; and (4) the costs of mainstreaming Rachel. This analysis directly addresses the issue of the appropriate placement for a child with disabilities under the requirements of [the IDEA]. Accordingly, we approve and adopt the test employed by the district court.

Holland, 14 F.3d at 1404.

D. Seventh Circuit's LRE Analysis

In an LRE case decided in 1988, the Seventh Circuit applied the criteria of the *Roncker* feasibility test, without adopting the test, per se. *Lachman v. Illinois State Board of Education*, 852 F.2d 290, 299 (7th Cir. 1988), *cert. denied*, 488 U.S. 925 (1988). Seven years later, the Seventh Circuit specifically denied that it had adopted an LRE standard: "This Court has not set forth a specific test for the lower courts to apply regarding the determination of LRE. . . ."

Monticello School District No. 25 v. George L., 102 F.3d 895, 906 (7th Cir. 1996); *See also D.F. v. Western School Corp.*, 921 F.Supp. 559, 566 (S.D. Ind. 1996) (finding that the Seventh Circuit had not adopted an LRE test).

The Seventh Circuit similarly declined to adopt an LRE test in this case. Instead, the Court held that the IDEA provided an appropriate framework to decide LRE cases "since each student's educational situation is unique." Pet., App. A at 10a. The Court held that:

> [I]f Beth's education at Lake Bluff Middle School was satisfactory, the school district would be in violation of the Act by removing her. If not, if its recommended placement will mainstream her to the maximum appropriate extent, no violation occurs. In this case, we can say with confidence that the Lake Bluff school district's decision to remove Beth from her regular school did not violate the IDEA's mandate to mainstream disabled children to the maximum extent appropriate.

Pet., App. A at 10a-11a.

The Seventh Circuit's decision is a genuinely common-sense approach to the LRE issue. The IDEA and its implementing regulations state that to the "maximum extent appropriate," children with disabilities will be educated with children who are nondisabled and children with disabilities will only be removed from the regular education environment "if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

Individuals with Disabilities Education Act, 20 U.S.C. § 1412(a)(5)(A) (1997); Assistance to States for the Education of Children with Disabilities, 34 C.F.R. § 300.550(b) (1999).

The definitions of "appropriate" and "satisfactory" in this context will depend on the needs of the student at issue, a fact which this Court has previously recognized:

> The [IDEA's] use of the word 'appropriate' thus seems to reflect Congress' recognition that some settings simply are not suitable environments for the participation of some handicapped children.

Bd. of Educ. v. Rowley, 458 U.S. 176, 197 n.21 (1982).

For one student, issues concerning behavior and disruption to her classmates will rise to the forefront. For another student, a sixth grade curriculum that is modified to a preschool level will take precedence. For yet a third student, the ability to model the language and/or behaviors of his peers will be the determining factor.

The regulations implementing IDEA provide even more specific LRE considerations: the IEP team making the placement decision must include the parents, other persons knowledgeable about the child, the meaning of the evaluation data and the placement options; the placement recommended by the team must be as close as possible to the child's home; the child must be educated in his or her home school unless the IEP requires a different arrangement; consideration must be given to any potential harmful effects on the child or on the quality of services that he or she needs; and modifications

to the general curriculum cannot be the sole basis for removing a child from his or her home school. 34 C.F.R. § 300.552 (1999).

Contrary to what Petitioners would have this Court believe, all four of the above-described LRE tests (analysis in the Seventh Circuit) are nearly identical. They each require the decision-maker to examine the student's current educational placement and the proposed educational placement. *Roncker* begins by looking at the more restrictive placement, then asks whether the less restrictive placement can be made appropriate. *Roncker*, 700 F.2d at 1063. *Daniel R.R.* simply does the opposite, by first evaluating the appropriateness of the less restrictive placement, then turning its attention to the more restrictive placement. *Daniel R.R.*, 874 F.2d at 1048.

Holland adopted a hybrid of the *Roncker* and *Daniel R.R.* tests, a perfect example of how compatible the tests are. *Holland*, 14 F.3d at 1404. Finally, the Seventh Circuit held that the IDEA itself provides the appropriate framework for LRE decisions to be made, which takes into account precisely the same factors that its three sister Circuits found applicable in their LRE analyses. Pet., App. A at 10a.

The same fact pattern applied to each of the LRE analyses adopted by these four Circuits would result in identical outcomes. Each of the LRE tests articulated by the Circuit Courts, including the Seventh Circuit's analysis, uses as its baseline the student's unique needs. Contrary to Petitioners' assertion, each Circuit Court recognizes the IDEA's LRE mandate, a cornerstone of the IDEA.

Petitioners fail to articulate how the Circuits are split on the issue of determining LRE. Since each Circuit Court to examine the issue has applied the same reasoning, there is no conflict between the Circuits.

In addition, Petitioners argued, but failed to show how the Seventh Circuit's decision conflicts with the language of the IDEA. The Seventh Circuit specifically applied the language of the IDEA and its implementing regulations in making its decision. Pet., App. A at 10a.

II.

THIS CASE DOES NOT HAVE FAR-REACHING SPECIAL EDUCATION IMPLICATIONS

The fact pattern of this case is impossible of being replicated. It addresses Beth's education and her unique needs. The Seventh Circuit's decision to interpret the language of the IDEA and its implementing regulations when determining LRE issues is entirely appropriate and recognizes the individualized nature of the IEP process.

The Seventh Circuit's decision will not result in a single instance (let alone an onslaught as Petitioners would have this Court believe) of a more restrictive educational placement being made for a child with a disability. Recommendations for more restrictive placements are made on a case-by-case basis and take into account the expertise of school officials that even the Seventh Circuit held it "[could not] match." Pet., App. A at 11a.

Contrary to Petitioners' assertion, the Seventh Circuit's decision does not require disabled children to "justify" their

presence in regular education classrooms. Obviously designed to catch this Court's attention, Petitioners ignore the crux of the decision:

> [The IDEA's] preference for mainstreaming demands a hard look and a careful analysis of the education Beth was receiving at Lake Bluff Middle School. Beth's parents rely on misplaced language from *Rowley* to argue that so long as she was receiving *any* benefit — improvement in eye contact, or progress in responding to a request to "look" or "touch" — her removal would violate the LRE requirement. We cannot agree with this definition of satisfactory education. . . . Beth's parents turn the "some educational benefit" language on its head. Instead of granting flexibility to educators and school officials, [parents' argument] places an extreme restriction on [school districts'] policymaking authority and the deference they are owed; it essentially vitiates school districts' authority to place any disabled children in separate special education environments. Neither Congress nor the Supreme Court intended such a result.

Pet., App. A at 9a-10a (citations omitted).

This case does not have far-reaching implications for students receiving special education services. Petitioners' attempt to argue such should be disregarded.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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